

SERVED: June 5, 1992

NTSB Order No. EA-3578

UNITED STATES OF AMERICA  
NATIONAL TRANSPORTATION SAFETY BOARD  
WASHINGTON, D.C.

Adopted by the NATIONAL TRANSPORTATION SAFETY BOARD  
at its office in Washington, D. C.  
on the 18th day of May, 1992

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BARRY LAMBERT HARRIS,  
Acting Administrator,  
Federal Aviation Administration,

Complainant,

Docket SE-9978

v.

ELVIN L. MYRICK,

Respondent.

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OPINION AND ORDER

Respondent has appealed from the oral initial decision of Administrative Law Judge William E. Fowler, Jr., issued on October 6, 1989 following an evidentiary hearing.<sup>1</sup> We deny the appeal.

The law judge affirmed an order of the Administrator that charged respondent with violating sections 91.9, 91.65(a), and 91.67(e) of the Federal Aviation Regulations ("FAR," 14 C.F.R. Part 91), in connection with an incident that occurred on July

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<sup>1</sup>The initial decision, an excerpt from the hearing transcript, is attached.

23, 1987 in the vicinity of Merrick Island Airport, FL ("MIA").<sup>2</sup>  
The law judge also affirmed the Administrator's 90-day suspension of respondent's private pilot certificate.

The order of suspension charged that respondent, in operating a Piper PA-30 in the area and on the date above noted, twice overtook and passed within 150 feet of a Cessna 172, compelling the Cessna to take evasive action to avoid a mid-air collision, and that the Piper failed to yield as required by the regulations.

At the hearing, the Administrator offered the testimony of the pilot of the Cessna, a witness on the ground, and the involved FAA inspector. The pilot (Mr. Binder), who was in the process of giving a rental check-out at the time, testified to the events. He was sitting in the right seat, checking the potential lessee's touch and goes. A passenger sitting behind the right seat pointed out the right window of the aircraft. To see, Mr. Binder banked left, and saw respondent "bearing down" on him roughly 150 feet away with only approximately 10 feet

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<sup>2</sup>§ 91.9 (now 91.13) provided:

No person may operate an aircraft in a careless or reckless manner so as to endanger the life or property of another.

§ 91.65(a) (now 91.111(a)) provided:

No person may operate an aircraft so close to another aircraft so as to create a collision hazard.

§ 91.67(e) (now 91.113(f)) provided:

Overtaking. Each aircraft that is being overtaken has the right-of-way and each pilot of an overtaking aircraft shall alter course to the right to pass well clear.

vertical separation. Binder made a descending left turn. The Piper passed over him so closely he could hear its engines, and departed to the west. Tr. at 40-45.<sup>3</sup> Just a few minutes later, according to Mr. Binder, the Piper appeared on the Cessna's left side at a parallel altitude, closed within 150 feet, passed the Cessna, and landed ahead of it. Mr. Binder testified that he believed, while the first incident may have been accidental, that the second was a deliberate "buzzing." Id. at 52-53. In his view, all three occupants of the aircraft were shaken and upset by these events.

Ms. Polland, a student pilot who was in an airport office at the time of the first incident, testified that she could see the traffic pattern the Cessna was flying. She allegedly witnessed the first incident and, although she could not tell the exact amount of separation between the two aircraft, she testified to seeing the Piper closing rapidly on the Cessna. She was alarmed by how close they appeared to be. Tr. at 82.

Respondent testified in his own defense. He described his experience as a survey pilot, noting the precision the task requires. He denied any impropriety, claiming that it was Mr. Binder who, in fact, cut off another aircraft during takeoff. Respondent thereafter kept the Cessna in view at all times and, once aloft, crossed behind him 1900 feet distant, with 200 feet vertical separation. Tr. at 123, 130. He introduced diagrams

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<sup>3</sup>Initially, the prospective aircraft lessee was piloting. When the passenger pointed out the Piper, Mr. Binder took over the controls.

(Exhibit R-1) indicating the aircrafts' relative positions at various times.

Respondent further testified that he attempted to contact the Cessna by radio to allay that pilot's fears and assure him nothing dangerous had happened, but was unable to do so due to Mr. Binder's extended radio diatribe.<sup>4</sup> As a result, instead of proceeding to his destination, respondent returned to MIA to resolve the matter. According to respondent, the second alleged incident never occurred. Instead, he landed while the Cessna was still some distance from the airport.

Two other witnesses, both of whom knew respondent, testified to his ability as a pilot, and his concern for safety. Mr. Brooks testified to the inability of the Piper to complete the maneuvers claimed by the Administrator,<sup>5</sup> and to Mr. Binder's reputation as someone who said things he later regretted. Mr. Brooks also commented on Ms. Polland's testimony. He stated that the distance between the office and the runway used by the two aircraft was approximately 2500 feet, and that he was unable to see all of the traffic pattern from the office window through which Ms. Polland allegedly saw the first incident.

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<sup>4</sup>Respondent characterized Mr. Binder's radio communications as "operating his broadcast station . . . reciting what he intended to do about that yellow Seneca pilot [yellow referring to the color of the aircraft]." Tr. at 131. Mr. Binder denied being on the radio as long as respondent claimed. He testified to making only two short calls. Tr. at 67.

<sup>5</sup>He testified that, even with a maximum performance turn, the Piper could not come within 900 feet of the standard traffic pattern that was flown by the Cessna. Tr. at 184.

Mr. Kirby, a former military pilot, traffic controller and friend of respondent, offered similar testimony. He estimated the distance from the window to the runway as 1 mile, stated that he could not see all the traffic pattern through the window, and averred that when one plane is blocking another, the distance between them cannot be judged.<sup>6</sup>

In rebuttal, the FAA investigator challenged respondent's evidence regarding the capabilities of the respective aircraft. He testified that, after takeoff, the Piper could overtake the Cessna and close on it as alleged. Further, he stated that, from the office window, he could see all the traffic pattern for the involved runway. He noted, finally, that, while horizontal separation cannot be accurately judged from 2500 feet, whether the aircraft are 150 or more than 1500 feet apart can be discerned.

In his decision, the law judge placed great weight on the testimony of Ms. Polland who, in his view, was a disinterested witness. Tr. at 245-246. He found that the first incident was a lapse or deficiency in judgement by an experienced pilot (Tr. at

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<sup>6</sup>In addition, respondent sought to postpone the law judge's decision to take the deposition of another witness unavailable for the hearing. The law judge instead accepted into the record counsel's characterization of that testimony, as follows. First, respondent and this individual (a flight instructor employed by the same company as Mr. Binder) attempted to replicate the actions of the two aircraft. They found, as Mr. Brooks testified, that the Piper cannot reproduce the Cessna's takeoff in the MIA traffic pattern, the former having a much wider turning radius. Thus, arguably, the Piper could not have been as close to the Cessna as claimed. Second, according to counsel, this witness would have testified that Mr. Binder had a reputation for not being truthful.

244); he did not determine the cause of or motive for the second incident, being reluctant to find it was intentional. Having made the findings pertinent to each charge, he concluded that, as there had been two potential collision hazards, a 90-day suspension was appropriate.

On appeal, and noting that the law judge's decision hinged on credibility determinations, respondent contends that the Administrator's version of events is incredible, erroneous, and inconsistent with the weight of the evidence. Precedent, therefore, allows the Board to disagree with the law judge's conclusion.

Respondent first attempts to undermine Mr. Binder's testimony by pointing out alleged inconsistencies. Next, he argues that Ms. Polland's testimony is consistent, not with Mr. Binder's version of events, but with respondent's version, and that she failed to corroborate Mr. Binder's evidence. Respondent argues that to believe her in the face of contradictory testimony from more experienced airmen is incredible and erroneous. Respondent believes the law judge misinterpreted Ms. Polland's testimony, accepting as fact what she only thought she saw.

We agree with respondent only on the applicable law. Indeed, we will not disturb the credibility determinations of a law judge absent clear error. Administrator v. Borgen, 5 NTSB 757, 760 (1985). On this record, we cannot find that the law judge's conclusion is inconsistent with the weight of the evidence or somehow based on incredible testimony. We,

therefore, affirm the law judge's conclusion.

First, we do not find Mr. Binder's testimony so inconsistent as to be incredible. Although respondent makes much of the difference between Mr. Binder's earlier statements to Inspector Phillips and his testimony at the hearing, we see little difference and no confusion or inconsistency between them. The former simply omitted that, to see the Piper, he had to bank his aircraft.<sup>7</sup>

Second, we are unconvinced by respondent's attempts to impeach Ms. Polland's testimony. Her relative inexperience as a pilot does not detract from her eyewitness account of the first incident. Her stated ability to see the traffic pattern was confirmed by Inspector Phillips. The testimony by witnesses Kirby and Brooks -- that they could not see the base leg of the traffic pattern from the window -- also does not contradict her testimony, when the incident did not occur there but on the downwind leg.

Similarly, respondent does not show how Ms. Polland's statement that she saw the Piper behind the Cessna and climbing is inconsistent with Mr. Binder's recollection that, when he first saw the Piper, it was 10 feet above him. Respondent had recently taken off from MIA, and the Administrator did not allege that Mr. Binder and Ms. Polland saw the events at exactly the

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<sup>7</sup>At one point in the hearing, it is clear that respondent's counsel had Mr. Binder totally confused. Tr. at 72-73. We have no doubt that the intended thrust of his testimony was that he banked the Cessna to be able to see the aircraft his passenger had noticed.

same time.<sup>8</sup> Further, to characterize her testimony as reflecting what she thought she saw, as opposed to what actually occurred, does nothing to alter the nature of the inquiry: it remains a credibility determination, and the law judge's reliance on her testimony has not been shown to be so at odds with the evidence as to be arbitrary or capricious. The law judge's credibility choices "are not vulnerable to reversal on appeal simply because respondent believes that more probable explanations . . . were put forth." Administrator v. Klock, NTSB Order EA-3045 (1989), slip op. at 4.

ACCORDINGLY , IT IS ORDERED THAT:

1. Respondent's appeal is denied;
2. The 90-day suspension of respondent's private pilot certificate shall begin 30 days from the date of service of this order.<sup>9</sup>

COUGHLIN, Acting Chairman, LAUBER, KOLSTAD, HART, and HAMMERSCHMIDT, Members of the Board, concurred in the above opinion and order.

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<sup>8</sup>For the same reason, it was not inherently inconsistent for her to testify that the Piper passed to the right of the Cessna and for Mr. Binder to testify that it passed directly over him, nor is it incredible that Ms. Polland did not mention any evasive maneuver by the Cessna. She was not asked. In any case, we would not expect eyewitnesses to have the exact same impression and recollection of events, especially those that occur quickly. See Administrator v. Shephard, NTSB Order EA-2961, slip op. at 4-5 (1989).

<sup>9</sup>For the purposes of this order, respondent must physically surrender his certificate to an appropriate representative of the FAA pursuant to FAR § 61.19(f).